(6)

No. 87-6177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,

Petitioner,

v.

JAMES A. LYNAUGH, Director
Texas Department of Corrections

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. At the punishment phase of a Texas capital murder trial, must the trial court upon a proper request, (a) instruct the jury that they are to take into consideration all evidence that mitigates against the sentence of death and (b) define terms in the three statutory questions in such a way that in answering these questions all mitigating evidence can be taken into consideration?

2. Is it cruel and unusual punishment to execute an individual with the reasoning capacity of a seven year old?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 832 F.2d 915 (5th Cir. 1987), and is set out on pages 284 - 319 of the Joint Appendix (J.A.)

The memorandum decision of the United States District Court for the Eastern District of Texas has not been reported. It is set out on pages J.A. 234 - 273.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254 Petitioner filed a petition for writ of habeas corpus by a person in state custody in the United States District Court, Eastern District of Texas, Lufkin Division on April 28, 1987. In a memorandum opinion, the writ was denied on May 8, 1987; final judgment was entered (ROA 3, J.A. 274)[1] and certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit was granted. ROA 1, J.A. 275. The Fifth Circuit rendered its judgment denying relief on November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. J.A. 320. Petition for Writ of Certiorari was filed in this Court January 4, 1988 and Certiorari was granted on questions 1 and 2 on June 30, 1988. J.A. 321. Jurisdiction in this Court is pursuant to 28 U.S.C. § 1254 which provides for review by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution;

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[1] The number after ROA is the page number of the Record on Appeal filed in the United States Court of Appeals for the Fifth Circuit. The number after J.A. is the page number of the Joint Appendix.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Art. 37.071 Texas Code of Criminal Proc.:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

and § 12.31 (b) Texas Penal Code:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

STATEMENT OF THE CASE

PROCEEDING AND DISPOSITION IN THE COURTS BELOW:

Penry was tried on a change of venue in the 258th Judicial District Court, Trinity County, Texas. The jury

answered all three special issues yes and Penry was sentenced to death on April 18, 1980. His conviction was affirmed, in a published opinion, by the Court of Criminal Appeals of Texas May 1, 1985. *Penry* v. *State*, 691 S.W.2d 636 (Tex. Cr. App. 1985). Petition for Writ of Certiorari was denied by the United States Supreme Court on January 13, 1986. ___ U.S. ___, 106 S.Ct. 834 (1986). Writ of Habeas Corpus was denied by the Court of Criminal Appeals of Texas without written opinion on May 5, 1986. A writ of habeas corpus under 28 U.S.C. § 2254 was denied by the United States District Court, Eastern District of Texas, Lufkin Division, on April 28, 1987 with final judgment entered (ROA 3, J.A. 274) and certificate of probable cause to appeal granted on May 8, 1987. ROA 1, J.A. 275. The United States Court of Appeals for the Fifth Circuit panel decision was rendered November 25, 1987. Suggestion for Rehearing En Banc and Rehearing were denied on December 23, 1987. J.A. 320. Petition for Writ of Certiorari was filed on January 4, 1988 and certiorari granted on June 30, 1988. J.A. 321.

STATEMENT OF FACTS:

> "On the morning of October 25, 1979, Pamela Carpenter was brutally beaten, raped and stabbed with a pair of scissors in her own home in Livingston, Polk County, Texas. She died a few hours later, . . ."

Penry v. *Lynaugh*, 832 F.2d 915, 917 (5th Cir. 1987), J.A. 285.

Before she died she gave a description of her assailant. Two local sheriff's deputies, decided the description was that of Johnny Paul Penry. They picked him up at his father's house, took him first to the police station where they were joined by several other law enforcement officers, they all went back to the house where Penry lived and then to the crime scene. At the crime scene, Penry

made a verbal admission after which he was taken before a magistrate following which a statement was reduced to writing which Penry, a retarded illiterate, signed. The next day, another more detailed statement was reduced to writing and signed by Penry. *id.* J.A. 285-6.

At the punishment phase of Penry's trial, the following objections were made to the jury instructions;

OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term "deliberately."

* * *

OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."

* * *

OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term "continuing threat to society."

* * *

OBJECTION 8: The next objection of the Defendant is that the Defendant objects to the submission of the verdict form permitting the jury to assess the death penalty because under the evidence produced in this cause said punishment would be cruel and unusual punishment prohibited by the eighth amendment to the United States Constitution and by Article One, Section Thirteen of the Texas Constitu-

tion, because among other reasons it is excessive in that the punishment involves the unnecessary and wanton infliction of pain and is grossly out of proportion to the severity of the crime, especially in view of the mental illness and condition of the defendant.

* * *

OBJECTION 10: The next objection is the Defendant further objects to the Court's Charge because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances.

OBJECTION 11: The next objection to the Court's Charge

* * *

is that it fails to instruct the jury to the following effect: "you may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in . . . the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is

> that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

XVII R. 2659 · 2664.[2] J.A. 210-2.

These objections to the charge were overruled. XVII R. 2664. J.A. 213.

The mitigating evidence in Penry's case was discussed by the U.S. District Court below as follows;

> This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.
>
> Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severly beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.

[2] The Roman numeral is the volume number of the Texas Court of Criminal Appeals' record on appeal filed as an exhibit in the court below. The number after R. is the page number.

> Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

ROA 10-11, J.A. 236-7.

The United States Court of Appeals for the Fifth Circuit summarized Penry's mitigation facts stating,

> Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

Penry v. *Lynaugh*, 832 F.2d at 925. J.A. 303.

SUMMARY OF ARGUMENT

THE TEXAS CAPITAL PUNISHMENT STATUTE AS APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Under the Texas Capital Punishment Statute, the punishment phase consists of three special issues relating to whether the defendant acted deliberately in causing the death of the deceased, whether the defendant would constitute a continuing threat to society and whether the killing was an unreasonable response to provocation, if any, by the deceased. If all three are answered yes, the defendant is sentenced to death. This Court has held that, any capital punishment statute that does not provide a means for the sentencing authority to take into consideration all the evidence that mitigates against the sentence of

death, is a violation of the Cruel and Unusual Punishment clause of the Eighth Amendment to the United States Constitution. Penry requested jury instructions that would provide a means for the jury to take into consideration the fact that he was mentally retarded with the reasoning capacity of a six to seven-year-old and had an abused childhood. These factors would increase the likelihood he would be a future danger but are also factors which reduce his culpability. These jury instructions were denied. Failure to give the requested instructions prevented the jury from considering all the evidence that mitigated against the sentence of death and accordingly his sentence of death is cruel and unusual punishment.

EXECUTION OF A MENTALLY RETARDED PERSON WITH THE REASONING ABILITY OF A SEVEN YEAR OLD IS CRUEL AND UNUSUAL PUNISHMENT:

This Court has held that to execute a defendant that was 15 years old at the time he did the offense and to execute a defendant that is presently insane violates contemporary standards and is cruel and unusual punishment. To execute Penry, who has the reasoning ability of a six or seven year old is a parallel issue. The ABA Standards for Criminal Justice state that mental retardation should mitigate against the maximum punishment. Public opinion surveys show that three out of four people are against the execution of the mentally retarded. One state has recently passed a law which prohibits the execution of mentally retarded defendants. Texas prohibits the execution of anyone that was under 17 years old at the time the offense was committed. The American Association on Mental Retardation is against the execution of the mentally retarded. To execute Penry would be against contemporary standards and accordingly would be cruel and unusual punishment.

ARGUMENT AND AUTHORITIES

THE TEXAS CAPITAL PUNISHMENT STATUTE AS APPLIED TO PENRY WAS A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In concluding that the execution of a mentally retarded person was not cruel and unusual punishment the United States District Court below found that mental retardation was nothing more than one of the mitigating factors to be considered. ROA 13, J.A. 238. In Texas the punishment phase of a capital murder trial consists of the jury answering three narrowly drawn special issues:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

Art. 37.071 Tex. Code Crim. Proc. Ann.

The first two special issues are actually aggravating factors while the third issue is a mitigating factor.

The Assurance Made In Jureck:

Any death penalty statute that fails to require that the trier of fact at the punishment phase must consider all mitigating circumstances before assessing the death penalty is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution's prohibition of cruel and unusual punishment. *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). In *Jurek* v. *Texas*, 428 U.S. 262, 272 (1976) this Court held that,

> The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.
>
> * * *

This Court further observed that at that time,

> The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to a allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

id.

> By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing functions.

id. at 276.

The concurring opinion in *Jureck* v. *Texas* by Justice White agreed that the Texas Statute was constitutional

because "The statute does not extend the juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *id.* at 279.

Judge Odom, concurring in part and dissenting in part, to the opinion in *Jureck* v. *State*, agreed that the statute did not extend juries discretionary power stating;

> Where is the "discretion" referred to in the majority opinion? Each pertinent portion of Art. 37.071 uses "shall", the command form, rather than the permissive "may." The jury is required to answer special issues. These questions each require a factual determination by the jury. If the fact questions are answered in the affirmative, pronouncement of a sentence calling for the ultimate penalty is absolutely mandated by Art. 37.071. The word "shall" in Art. 37.071 inflexibly requires certain procedures to be followed, allowing no discretion in the punishment to be received by a defendant who is guilty of capital murder.
>
> Before a person may serve as a juror, he must state under oath that the mandatory penalty of death or life imprisonment will not affect his deliberations on any issue of fact. Art. 1257(d), V.A.P.C. [now § 12.31 (b) Texas Penal Code]. In order to grant "mercy" in a particular case, the jurors must ignore their oaths and return a deliberately falsified answer to one of the fact issues in Art. 37.071(b). Unless this Court is to presume that jurors will ignore their oaths and return perjured answers to one or more of the issues, a complete prevarication, solely to arrive at the result they may feel is proper in a given case, we must hold this statute is mandatory, leaving no discretion to the jury in the matter of assessing punishment.

522 S.W.2d 934, 944 (Tex. Cr. App. 1975)

The opinion in *Jureck* v. *State*, after listing all the factors relied upon by this Court in finding the three

Special Issues were adequate to assure all mitigating evidence could be considered by the sentencing jury concluded that,

> To eliminate all discretion on the part of the jury would be a risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence.

id. at 940.

Based upon this assurance that the Texas Court of Criminal Appeals was defining the terms in the "three questions" in such a way that the jury, in answering these three questions, could take into consideration all mitigating circumstance, the statute was upheld.

The Plurality Opinion In Franklin:

Twelve years later, the plurality opinion in *Franklin* v. *Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320 (1988), after first disposing of Franklin's argument that the Texas statute, without the jury instructions requested, precluded the jury from taking into consideration the mitigating factors of good adjustment to prison life and "lingering doubt", addressed the constitutionality of the Texas Statute stating,

> It is true that since *Jurek* was decided, this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of juries' sentencing discretion. See, e.g., *Eddings* v. *Oklahoma*, 455 U.S. at 113-117, *Lockett* v. *Ohio*, 438 U.S., at 608 (opinion of Burger, C.J.). But even in so doing, this Court has never held that jury discretion must be unlimited or unguided:
>
> * * *

> Our cases before and since have similarly suggested that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses" and that the "Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California* v. *Brown*, 479 U.S. 538, 541 (1987). See also *Proffitt* v. *Florida*, 428 U.S. 242, 253 (1976) (joint opinion); *Gregg* v. *Georgia*, supra, at 189, 195, n. 46, 196, n. 47, 198 (joint opinion).
>
> Arguably these two lines of cases - *Eddings* and *Lockett* on the one hand, and *Gregg* and *Proffit* on the other - are somewhat in "tension" with each other. See *California* v. *Brown*, 479 U.S., at 544 (O'Connor, J., concurring).

id. at ___, 108 S.Ct. at 2331.

Justice White's plurality opinion concludes that the Texas Special Issues adequately, "allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion."

id. at ___, 108 S.Ct. at 2332.

This Court in *Hitchcock* v. *Dugger*, without any dissent, found that the Florida death penalty statute upheld at the same time as *Jureck* v. *Texas*, was unconstitutional as applied. ___ U.S. ___, 107 S.Ct. 1821 (1987). Accordingly, the tension between the two lines of cases, *Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other appeared to have been resolved with this Court, in a unanimous opinion, following the *Lockett* and *Eddings* line of cases. *id.* at 1822.

The Concurring Opinion In Franklin:

Justice O'Connor, concurring in *Franklin*, expressed doubt about the portion of the plurality opinion where it,

> . . . goes on to suggest that a State may constitutionally limit the ability of the sentencing authority to give effect to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense that mitigates against the death penalty, Ante, at 2330, 2331, n. 10. Unlike the plurality, I have doubts about a scheme that is limited in such a fashion.

id. at ___, 108 S.Ct. at 2332.

Since the decision in *Jurek*, we have emphasized that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to consideration of that evidence by the sentencing authority. *Lockett* v. *Ohio*, 438 U.S. 586 (1978), established that a State may not prevent the capital sentencing authority "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." Id., at 605 (plurality opinion). We reaffirmed this conclusion in *Eddings* v. *Oklahoma*, 455 U.S 104 (1982), and in *Hitchcock* v. *Dugger*, 481 U.S. ___ (1987).

In my view, the principle underlying *Lockett*, *Eddings* and *Hitchcock*, is that punishment should be directly related to the personal culpability of the criminal defendant.

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime." *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original).

* * *

> If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

___ U.S. ___, 108 S.Ct. at 2332-3.

The mitigating evidence in Penry's case was discussed by the U.S. District Court as follows;

> This evidence indicates his I.Q. falls somewhere between 50 and 63, meaning he has the mind of a six or seven-year-old child and the social maturity of an eight to ten-year-old child. As a telling example of his mental deficiency petitioner refers to the fact that working daily with his aunt, it still required a year to teach him how to write his name.
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> Other examples abound. There can be no question that petitioner does not think like a "normal" person, but then no normal person would have committed a crime like the one of which Penry was convicted. The blame for Penry's condition probably lies at several doorsteps. There was evidence suggesting he was frequently and severely beaten by his mother, spent much of his childhood in state schools, and in his teens was victimized by other men who treated him like a slave. The ultimate doorstep must be Penry's, however, because he is the one who stands convicted of taking Pamela Carpenter's life.
>
> Although Penry may be mentally abnormal, his upbringing was also abnormal. He has treated others as others have treated him. It may never be clear what role societal factors played in causing Penry's condition.

ROA 10-11, J.A. 236-7.

The United States Court of Appeals for the Fifth Circuit similarly summarized Penry's mitigating facts stating,

> Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

Penry v. *Lynaugh* 832 F.2d at 925, J.A. 303.

The Dissent In Franklin:

Justice Stevens, dissenting in *Franklin* v. *Lynaugh* discussed the three special issues;

> On its face, the Texas capital sentencing scheme makes no mention of mitigating evidence. *Jurek*, 428 U.S., at 272. Instead it merely asks the jury to give a "yes" or "no" answer to two, and in some instances three, "Special Issues."
>
> * * *
>
> Although the jury was informed that if it answered both issues "yes" petitioner would be sentenced to death, neither of the Special Issues as they would have been understood by reasonable jurors gave the jury the opportunity to consider petitioner's mitigating evidence of past good conduct in prison to the extent that it encompassed matters beyond those relevant to answering the Special Issues. Petitioner therefore was at least entitled to an instruction informing the jury that it could answer one of the issues "no" if it found by that evidence that petitioner's character was such that he should not be

> subjected to the ultimate penalty. The failure to give such an instruction removed that evidence from the sentencer's consideration just as effectively as would have an instruction informing the jury that petitioner's character was irrelevant to the sentencing decision.

___ U.S. at ___, 108 S.Ct. at 2337.

* * *

As the plurality recognizes, *ante*, at 2330, petitioner has not raised a challenge to the constitutionality of the Texas sentencing scheme. Rather, he has merely asserted that the trial court's failure to give the jury instructions he requested was constitutional error.

> Our holding in *Lockett* previously has required us to vacate death sentences that were imposed pursuant to facially valid capital sentencing statutes. In *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), although the statute provided that a defendant could present evidence "as to any mitigating circumstances," id., at 115 n. 10, we set aside the death sentence because it appeared that the trial judge had not considered certain mitigating evidence offered by defendant. See *id.*, at 112-113. In *Hitchcock*, 481 U.S., at ___, even though we had sustained the Florida capital sentencing statute against a facial attack in *Profitt* v. *Florida*, 428 U.S. 242 (1976), we held that a Florida death sentence could not stand because the advisory jury had been instructed not to consider nonstatutory mitigating circumstances. The instant case is analogous; our decision in *Jurek* v. *Texas*, 428 U.S. 262 (1976), upholding the facial validity of the statute under which petitioner was sentenced to death is not dispositive of the question of whether his Eighth Amendment rights were violated because the sentencer was in effect instructed not to consider certain relevant mitigating evidence.

id. at ___, 108 S.Ct. at 2338.

Failure Of The Texas Court Of Criminal Appeals To Implement The Assurance Made In Jureck:

Almost twelve years have passed since *Jurek* v. *Texas* was decided and not only has the Texas Court of Criminal Appeals failed to define "criminal acts of violence" and "continuing threat to society" but it has also steadfastly refused to find error when, after timely motion by the defendant, the trial court has failed to instruct the jury on the meaning of these phrases. *Penry* v. *State*, 691 S.W.2d at 653-4, *Cannon* v. *State*, 691 S.W.2d 664, 677-8 (Tex. Cr. App. 1985), *King* v. *State*, 553 S.W.2d 105, 107 (Tex. Cr. App. 1977). In addition the Texas Court of Criminal Appeals has refused to find error, when after a timely motion by the defendant, the tial court has failed to instruct the jury that in answering the questions on the defendant's deliberateness and continuing threat to society they are to take into consideration all mitigating circumstances. *Cordova* v. *State*, 733 S.W.2d 175, (Tex. Cr. App. 1987), *Clark* v. *State*, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986), *Stewart* v. *State*, 686 S.W.2d 118, 126, (Clinton, J. dissenting) (Tex. Cr. App. 1984).

Penry made a timely request for the following jury instructions:

> OBJECTION 2: The Defendant objects and excepts to the Charge on the grounds that it fails to define the term deliberately.
>
> * * *
>
> OBJECTION 4: The Defendant excepts and objects to the Court's Charge on the grounds that it does not define the terms that defendant would commit "criminal acts of violence."
>
> * * *

> OBJECTION 5: The Defendant objects and excepts to the Charge on the grounds that the Charge of the Court fails to define the term continuing threat to society.
>
> * * *
>
> OBJECTION 8: The next objection of the Defendant is that the Defendant objects to the submission of the verdict form permitting the jury to assess the death penalty because under the evidence produced in this cause said punishment would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and by Article One, Section Thirteen of the Texas Constitution, because among other reasons, it is excessive in that the punishment involves the unnecessary and wanton infliction of pain and is grossly out of proportion to the severity of the crime, especially in view of the mental illness and condition of the defendant.
>
> * * *
>
> OBJECTION 10: The next objection is the Defendant further objects to the Court's Charge because the special issues submitted do not authorize a discretionary grant of mercy based upon the existence of mitigating circumstances.
>
> OBJECTION 11: The next objection to the Court's Charge,
>
> * * *

is that fails to instruct the jury to the following effect: "you may take into consideration all of the evidence, whether aggravating or mitigating in nature, if any, submitted to you in the full trial of the case, that is all of the evidence submitted to you in the trial of the first part of this case wherein you were called up[on] to determine the guilt or innocence of the Defendant and all of the evidence, whether mitigating or aggravating in nature, if any, as permitted for you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

* * *

OBJECTION 13: The twelfth [sic] objection and exception to the Court's Charge is that it fails to require as a condition to the assessment of the death penalty that the State prove beyond a reasonable doubt whether the aggravating circumstances outweigh any mitigating circumstances so as to render improbable that the Defendant can be rehabilitated.

XVII R. 2659 - 64. J.A. 210-2.

In accordance with agreement these objections were reduced to writing and signed by Penry's attorneys. (XVII R. 2664. J.A. 212). These objections to the Charge were overruled, (XVII R. 2664. J.A. 213), and the Texas Court of Criminal Appeals found no error, holding all the requested terms were to be given their common definitions. *Penry* v. *State*, 691 S.W.2d at 653-4. It should be

noted that in *Williams* v. *State*, 674 S.W.2d 315, 322 (Tex. Cr. App. 1984) the Texas Court of Criminal Appeals admitted that the term "deliberate" has a limited meaning.

The following Charge was then given the jury:

* * *

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes", all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes". If the jury unanimously determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreman will so record the Jury's answer to such issue by signing his name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes", then such juror should vote "No" to that Special Issue in the Jury's deliberations.

* * *

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

* * *

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

* * *

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

* * *

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

TR. 117 - 118A.[3] J.A. 25-8.

At the punishment stage of his trial, Penry made the following argument:

> I was somewhat amazed that Mr. Keeshan, [the District Attorney] when he told you that you ought to return a verdict that you could go home and be proud of. Is there any pride in taking the life of any person, much less a person which the evidence has shown here was an afflicted child at the age of nine. The records reflect that this boy had an afflicted mind at

[3] The number after "TR." is the page number of the State Transcript filed as an exhibit in the United States Court of Appeals for the Fifth Circuit.

> the age of nine and we can't get around that.
>
> * * *
>
> And then, at the age of seventeen, we again find the condition of this boy as being mentally retarded, and even now, these doctors say he is mentally retarded. And then, they ask you can you be proud to be a party to putting a man to death with that affliction? I don't think you could sleep with yourself, with your conscience.
>
> * * *
>
> —the law does give the right to take lives, but there is no law on earth if that life has been taken can restore that life. I say, ladies and gentlemen of the jury, when you go out, you'll answer that first special issue "no." Because I think it would be the just answer, and I think it would be a proper answer.
>
> * * *
>
> They had one of their main witnesses here, Dr. Peebles, who's like a rubber stamp, who probably could not make a living out in the private practice of medicine, come in and say, he is of sound mind.
>
> * * *
>
> But now, he comes in here and he predicts that this boy in all reasonable probability will continue to get into trouble. That may be true. But, a boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of you juror's minds that there is something definitely wrong, basically, with this boy. And I think there is not a single one of you that doesn't believe that this boy had brain damage as they found it at the University of Texas, when they ran those tests and formed those conclusions. Ladies and gentlemen of the jury, if you go out and give this boy the death penalty—One of the objects of punishment is to deter others from committing similar offenses. That is supposed

to be it, but what do we have?

* * *

> But ladies and gentlemen, you also have your conscience and your faith as Christians to still remember that you should not take that which cannot be restored. And I say to you, you have heard the evidence. You are honorable people, and I think that Mr. Keeshan was in error when he told you. "I want you to render a verdict that you can be proud of."

XVII R. 2683-7, J.A. 222-4.

The state then countered this plea for jury nullification by arguing:

> I didn't hear Mr. Newman or Mr. Wright [defense attorneys] say anything to you about what your responsibilities are. In answering these questions based on the evidence and following the law, and that's all that I asked you to do, is go out and look at the evidence. The burden of proof is to on the State as it has been from the beginning, and we accept that burden. And I honestly believe that we have more than met that burden, and that's the reason you didn't hear Mr. Newman argue. He didn't pick out these issues and point out to you where the State had failed to meet this burden. He didn't point out the weaknesses in the State's case because, ladies and gentlemen, I submit to you we've met our burden.

XVII R. 2689-90, J.A. 225-6.

Penry was permitted to argue all the mitigating circumstances to the jury, but, the Court refused to instruct the jury as to where or how mitigating circumstances were to be applied in deciding the three special issues. Penry could only suggest to the jury that if they did not believe a mentally retarded person should get the death penalty they should pick one special issue and vote "no" even if the State had proven the answer should be "yes." That is, Penry could only suggest jury nullification of the law. As

the Court of Criminal Appeals tacitly admits in *Blansett* v. *State*, 556 S.W.2d 322, 327 n.6 (Tex. Cr. App. 1977), jury nullification is the only way all mitigating circumstances can be taken into consideration by the Texas death penalty statute. See also *Granviel* v. *Estelle*, 655 F.2d 673, 676 (5th Cir. 1981). Unless it is assumed Texas jurors will violate their oath to follow the law as given by the trial judge, having to depend on jury nullification places an intolerable burden on Penry. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. at 271. There is no reason to believe that Texas juries will not do as the judge did in *Eddings* v. *Oklahoma*, supra, and follow the law as they understand it by reading the charge and ignoring any evidence that did not directly relate to the answering of the three issues given in the jury instructions. This is especially true since this is precisely what the state in its final argument, told the jury they were required to do. XVII R 2688 - 90. J.A. 225-6.

The rationale used by the Texas Court of Criminal Appeals in holding no special instructions on mitigating evidence is required was discussed in *Cordova* v. *State* as follows:

> Our understanding of both *Eddings* [455 U.S. 104], supra, and *Lockett* [438 U.S. 586], supra, is that the Supreme Court did *not* mandate that a prospective juror must give any amount of weight to any particular fact that might be offered in mitigation of punishment, nor has our research to date revealed where this Court has ever laid down such a requirement. We believe that when properly read, *Eddings*, supra, and *Lockett*, supra, merely held that the fact-finder must not be precluded or prohibited from considering any relevant evidence offered in mitigation of the punishment to be assessed, or in answering the

special issues. The decisions of the Supreme Court, and of this Court, do not, however, require an affirmative instruction that the fact-finder *must* give any specified weight to a particular piece of evidence, as appellant's counsel appears to contend. The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion" exercised by each juror. See *Adams* v. *Texas*, supra, 448 U.S. at 46. Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.

* * *

Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme, and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations. As previously pointed out, we find nothing in either *Eddings*, supra, or *Lockett*, supra, that would mandate the giving of a general or special instruction on mitigating evidence. E.g., *Demouchette* v. *State*, 731 S.W.2d 75 (Tex. Cr. App., No. 69, 143, September 24, 1986). Also see *Quinones* v. *State*, 592 S.W.2d 933, 947 (Tex. Cr. App. 1980), in which this Court held that no such affirmative instruction was necessary because "The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required."

733 S.W.2d at 189-190.

The above discussion must be considered along with the fact that Penry's jury, over objection, (TR. 48, J.A. 3-4) was required to take the oath § 12.31(b) Texas Penal Code;

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

The oath is given, even though no juror that refuses to take the oath will be disqualified. However, the jurors are not informed of this fact. *Granviel* v. *State*, 723 S.W.2d 141, 154-5 (Tex. Cr. App. 1986), *Penry* v. *State*, 691 S.W.2d 636, 656-7.

Although the argument in *Granviel* v. *State* was directed at the giving of the above oath, the giving of this oath should also be considered in the light of the Texas Court of Criminal Appeal's refusal to instruct the jury on the consideration of mitigating evidence. *Granviel* v. *State* argued against giving the oath as follows:

> Although the State has stopped questioning jurors about the oath required under 12.31(b) and therefore no one is excused for failure to take the oath (because they are not told they can avoid taking the oath), the harm attendant to administering the oath is still present. It does not make much sense to prevent some one from being excused for failure to take the oath because to do so would deprive the accused of a fair and impartial jury but then to allow the trial court to require the jury swear an oath not to let the imposition of the death penalty affect their deliberations. The oath not only violates the spirit of *Adams* v. *Texas*, supra, but also violates the tenets of *Edmund [sic]* v. *Florida*, supra, [458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140] in that it forces the jury to swear not to consider [sc. allow?] their feelings about the death penalty to affect their deliberations nor does the oath allow the jurors to consider mitigating evidence in determining whether to answer the questions yes or no. By giving the oath, the trial

> court has forced the jury to consider only the evidence which goes directly to the answering of the questions and to ignore the juror's feelings and arguments against the death penalty.

supra, at 154-5.

This argument was rejected by the Texas Court of Criminal Appeals. *supra* at 155-6.

Having the jurors take the oath in § 12.31 (b) Texas Penal Code restricts consideration of mitigating evidence more fully than the jury instruction in *California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837 (1987) that was narrowly upheld by this Court. Justice O'Connor joined the majority opinion by Chief Justice Renquist and filed a concurring opinion in which she discussed her reason for concurring in the judgment and opinion of the Court stating:

> In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.
>
> * * *
>
> Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion.

id at 841.

> Because it is open to the California Supreme Court to determine on remand whether the jury was adequately informed of its obligation to consider all of the mitigating evidence introduced by the respondent, I concur in the judgment and opinion of the Court.

id at 842.

Other indications that the Texas Court of Criminal Appeals is failing to define terms in the special issues of Art. 37.071 in a manner that allows consideration of all mitigating evidence are found in *Gardner* v. *State*, 730 S.W.2d 675 (Tex. Cr. App. 1987) and *Drew* v. *State*, 743 S.W.2d 207, (Tex. Cr. App. 1987). In *Gardner* a potential juror during voir dire was questioned on whether having found a person had intentionally killed someone she would automatically answer question No. 1, "yes." After the potential juror first said she would, the state on cross-voir dire got her to say she would not, after which the trial judge cut off further questioning. 730 S.W.2d at 685 - 688. The Court of Criminal Appeals found;

> A venireman who fails to perceive a difference between "intentional" and "deliberate . . ." will certainly have problems reconsidering guilty stage evidence for its probativeness toward special issues, or for that matter, considering any new evidence presented at the punishment phase with the requisite degree of impartiality.
>
> Judging from its final pronouncement, the trial court was apparently of a mind that it is "entirely impossible" that any reasonable juror would fail to discern a difference between the statutory terms. That is hardly a tenable position in view of the fact that at least four current members of this Court would favor submitting a requested jury instruction which would instruct jurors, *inter alia*, that "the word 'deliberately' has a meaning different and distinct from the "intentionally" as that word was previously defined in the charge. . .

id at 689.

The Texas Court of Criminal Appeals in *Lane* v. *State* 743 S.W.2d 617, 628 n.7, (Tex.Cr.App. 1987) admitted the term "deliberate" needs to be defined stating,

> V.T.C.A., Penal Code Sec. 6.03(a) sets out:

> "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or *cause the result.* (emphasis added) It seems appropriate to comment there on how beneficial it would be to this Court in resolving voir dire points of error for the Legislature to accept its responsibility, and define the term "deliberately" as it is set out in Art. 37.071(b)(1)."

The difficulties in distinguishing the difference between "deliberate" and "intentional" is further illustrated by the fact that as late as June 29, 1988 these words were interchanged in an opinion of the Texas Court of Criminal Appeals. *Hernandez* v. *State* ___ S.W.2d ___, No. 69, 649 slip opinion p. 3 (Tex. Cr. App. June 29, 1988). It may be argued that Penry's mental retardation could have been considered by the jury in answering Special Issue no. 1. Given the state of confusion that exists over the distinction, if any, between the meaning of "intentional" and "deliberate", that Penry's request that the term "deliberate" be defined by the Court was denied (XVII R. 2664, J.A. 213.), and that the jury had already found Penry acted intentionally when finding him guilty of capital murder; Special Issue no. 1 was inadequate as a means for the jury to take into consideration Penry's mental retardation as a factor mitigating against the sentence of death. Only when a defendant is so retarded that the defendant is incapable of acting deliberately could Special Issue no. 1 adequately encompass retardation as a mitigating factor.

In *Drew* v. *State*, 743 S.W. 2d 207, 211 (Tex. Cr. App. 1987) the Texas Court of Criminal Appeals held that a potential juror that would not answer Question No. 2 "yes" unless the state proved that the future dangerousness involved a danger to human life, could not

follow the law stating; "Although the phrase 'criminal acts of violence that would constitute a continuing threat to society' is not defined in the Code of Criminal Procedure, there is nothing in our case law to limit this portion of Article 37.071(b)(2), supra, to future murders." In this opinion, the Texas Court of Criminal Appeals held that a potential juror who states he would consider it a mitigating factor if the State failed to prove future dangerousness to human life could be excused for cause.

In the plurality opinion in *Hernandez* v. *State* Judge Teague addressed the issue of jury discretion in Texas capital cases stating,

> Unlike criminal juries generally, a capital jury is never called upon to assess punishment. In fact, nobody assesses punishment in a capital case. The law has pre-determined what the punishment will be depending only on certain conditions. The jury, as factfinder, only determines whether those conditions exist. The judge then pronounces sentence as the law requires. Neither is vested with any discretion in this regard. Indeed, the discretion to execute or merely incarcerate one convicted of capital murder was purposefully taken from judge and jury alike by the Legislature of this State in order to meet the perceived constitutional requirements of *Furman* v. *Georgia*, 408 U.S. 238.
>
> The only discretion left to jurors is in the mitigating weight which they may assign to relevant evidence bearing upon the special issues.

___ S.W.2d at ___, slip opinion p. 11 - 12.

The failure of the Texas Court of Criminal Appeals to implement the assurance made in *Jurek* has rendered it impossible for the jury to give effect to all the evidence that mitigates against the death penalty. This is particularly true when the mitigating evidence is mental retardation and an abused childhood.

The Dicta In Circuit Judge Reevely's Opinion Below:

This concern expressed by Justice O'Connor concurring in *Franklin* was addressed in the Fifth Circuit opinion by Circuit Judge Reevely in *Penry* v. *Lynaugh*. After pointing out that,

> Penry objected to the jury charge. He complained that the court failed to define "deliberately," "probability," "criminal acts of violence" and "continuing threat to society". He also objected that the court failed to instruct the jury to weigh aggravating and mitigating circumstances and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances.

832 F.2d at 920, J.A. 292-2.

Circuit Judge Reevely discussed the Eighth Amendment problems created by failure to give the jury the requested charge,

> The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. *think about)* the bearing of all the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead to the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death. It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendments' mandate of individualized application of all mitigation along with aggravation in the sentencing decision.

832 F.2d at 920, J.A. 293.

We read the Court's command that the sentencer not be precluded from "considering" any mitigating circumstances to mean that the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See *Zant* v. *Stephens*, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision.

* * *

The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future commit criminal acts of violence that constitute a threat to society. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to *decline to impose the death penalty*"? *McCleskey*, 107 S.Ct. at 1773. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring).

* * *

Penry's conviction is a good example of mitigating circumstances that pose a problem under the Texas scheme. Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state schools. One effect of his retardation was his inability to learn from his mistakes.

The evidence is similar to that in *Hitchcock* and *Eddings*. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence of his background and child abuse, logically, does not. The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question. What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances.

832 F.2d at 924-925, J.A. 301-4.

Without instructions on the necessity for considering all mitigating evidence and without proper definitions of term it is simply impossible for Texas' special issues to encompass all mitigating circumstances. In *Jurek* v. *Texas*, this Court upheld the three special issues on the assumption that proper definitions would be forthcoming. 428 U.S. at 272 (1976) None of the terms have been given definitions by the Texas Court of Criminal Appeals and no instructions on consideration of all mitigating evidence is ever given. The Texas Court of Criminal Appeals having defaulted on its promise, the Texas statute should be held a violation of the Eighth Amendment to the United States Constitution as applied. See *Godfrey* v. *Georgia*, 446 U.S. 420 (1980.) With jury nullification the only way for all the mitigating evidence to be considered, too great a burden was placed on Penry. By restricting the jury to answering the three statutory questions without any definitions or instructions on consideration of all mitigating circumstances or informing the jury they could vote no on one or both special issues should they believe the death penalty was not appropriate, Penry's jury was just as effectively precluded from consideration of all mitigating evidence as was the Florida jury in *Hitchcock* v. *Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987).

EXECUTION OF A MENTALLY RETARDED PERSON WITH THE REASONING ABILITY OF A SEVEN YEAR OLD IS CRUEL AND UNUSUAL PUNISHMENT:

In *Ford* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2595 (1986) this Court held that an insane person cannot be executed and in *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988) this Court held that a defendant who was 15 years old at the time he committed the crime cannot be executed. Execution of a person as mentally

retarded as Penry is a parallel issue. Accordingly, the holding in these two cases provide support for the proposition that to execute a person as retarded as Penry would be cruel and unusual punishment.

Mental retardation is not the same type of mental defect as insanity. Mental retardation is defined as:

> [S]ignificantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
>
> GENERALLY INTELLECTUAL FUNCTIONING is operationally defined as the results obtained by assessment with one or more of the individually administered standarized general intelligence tests developed for that purpose.
>
> SIGNIFICANTLY SUBAVERAGE is defined as IQ of 70 or below on standarized measures of intelligence. This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.
>
> DEFICITS IN ADAPTIVE BEHAVIOR are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standarized scales.
>
> DEVELOPMENTAL PERIOD is defined as the period of time between conception and the 18th birthday. Developmental deficits may be manifested by slow, arrested, or incomplete development resulting from brain damage, degenerative processes in the

> central nervous system, or regression from previously normal states due to psychosocial factors.

Classification in Mental Retardation, 1983 Revision, (Grossman, M.D., Ed.).

Since insanity and mental retardation are two different phenomena, the reasons why execution of an insane person and a mentally retarded person is cruel and unusual, are different. An insane person cannot be executed, because, to execute someone that is so out of touch with reality that he is not aware of why he is being executed is cruel and unusual punishment. *Ford* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, (1986). The reason for not executing a mentally retarded person is that he has a deficit in adaptive behavior and accordingly should not be held fully accountable for his crime. Mental retardation is a factor that mitigates against assessing the maximum punishment of death. Standard 7-9.3, *American Bar Association Standard for Criminal Justice*. Accordingly the test for determining if a mentally retarded defendant can be executed should be whether because of mental retardation the defendant has a deficit in adaptive behavior that significantly reduces his ability to learn from mistakes.

The Eighth Amendment to the U.S. Constitution assures that the State's power to punish is exercised within the limits of civilized society and central to any determination of whether punishment is cruel and unusual is the use of contemporary standards. *Ford* v. *Wainwright*, ___ U.S. ___ 106 S.Ct. 2595, 2600 (1986), *Woodson* v. *North Carolina*, 428 U.S. 280, 288 (1976). Contemporary standards can be determined by legislative enactments, court opinions, public opinion surveys and the position taken by recognized professional organizations. For at least the last 100 years Texas by statute has prohibited the execution of a person that was under 17

years of age at the time of the offense. Tex. Penal Code Ann. § 8.07(d), *Ex parte Walker*, 13 S.W. 861 (1890). This Court in *Ford* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2595 (1986) held that the Eighth Amendment prohibits the execution of the insane. In so doing this Court used as its starting point the common law principal that, "[I]diots and lunatics are not chargeable for their own acts, . . ." *id* at 2600. Under the common law,

> [An idiot is] a person who cannot account or number twenty pence, nor can tell who is his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.

Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 416 (1985).

A recent survey commissioned by Amnesty International found that in Florida 71% were against a mental retarded defendant being put to death while only 12% were in favor. ROA between pages 63 and 64. J.A. 279. A study by Center for Public and Urban Research, Georgia State University obtained similar results. (See Rule 28 (J) Authority filed in the Fifth Circuit, J.A. 283.) January 10-12, 1986 at the Council Meeting of the American Association of Mental Deficiencies[4] (AAMD) the Council unanimously endorsed the following resolution:

> The imposition of capital punishment on individuals with mental retardation raises troubling legal and moral issues. The AAMD supports legal reforms in

[4] The A.A.M.D. has changed its name to American Association on Mental Retardation.

> the States that comport with the standard of civilized Common Law nations.

24 Mental Retardation, No. 1 P.47 ROA 126, J.A. 280.

Following the execution of Jerome Bowden in Georgia June 24, 1986 the AAMD, a professional association that has nearly 10,000 members, issued a press release that severely condemned his execution. ROA 128A, J.A. 281-2. Following this execution the Georgia legislature passed a statute that prohibited the execution of the mentally retarded. O.C.G.A. § 17-7-131. On April 15, 1988, the Texas House of Representatives, Committee on Criminal Jurisprudence held its initial hearing on a similar law. It is highly probable that legislation to prohibit the execution of a mentally retarded person will be introduced at the next session of the Texas Legislature. (Personal communications with John Valdez, Assistant to the committee chairman, Juan J. Hinojosa. See also *Death Penalty Bar urged for Retarded*, Austin American Statesman, April 16, 1988, at B-3).

This Court has found that a person who was 15 years old at the time he committed the crime could not be executed. *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988). In concluding that to execute a juvenile that was 15 years old at the time the crime was committed was cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution the plurality opinion found that,

> "Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on one such as petitioner who committed a heinous murder when he was only 15 years old. *Enmund* v. *Florida*, 458 U.S. at 797. In making that judgment, we first ask whether the juvenile's culpability should be mea-

sured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders "measurably contributes" to the social purposes that are served by the death penalty. Id., at 798.

It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." *California* v. *Brown*, 479 U.S. 538, ___ (1987)(O'Connor, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating defendant's youth as a mitigating factor in capital cases:

> "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979). *Eddings* v. *Oklahoma*, 455 U.S., at 115-116 (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> "Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to the victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Id., at 115.

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

___ U.S., at ___, 108 S.Ct. at 2698-9.

In Oklahoma, the combined effect of the death penalty statute that set no minimum age and the statute for certification of a juvenile as an adult was that an offender that was 15 years old at the time of the offense could be sentenced to death. In *Thompson* v. *Oklahoma*, Justice O'Connor concurred with the plurality opinion reasoning since there was no indication that when these statutes were passed the Oklahoma legislature was aware of this result, to execute Thompson would be cruel and unusual punishment. ___ U.S. ___, 108 S.Ct. at 2710-11 (1988). The Texas legislature is in the process of considering whether the execution of a mentally retarded offender should be prohibited. Thus as soon as early Spring 1989 there could be proof that the Texas Legislature believes that under developing standards of civilized society execution of a mentally retarded offender should be prohibited.

Even if the Texas legislature passes such a statute, Penry will still be under a sentence of death. The Texas Court of Criminal Appeals has held that it is a violation of

the separation of powers provided for by the Texas Constitution for any branch of the government, other than the executive branch, to modify a sentence once the courts have acted. *Ex Parte Giles*, 502 S.W.2d 774, 786 (Tex. Cr. App. 1973). What would the situation be if the Governor of Texas chose not to commute Penry's sentence? If the Texas Legislature should prohibit the execution of a mentally retarded offender would it then be cruel and unusual punishment to execute Penry when to execute him prior to the legislature acting it would not?

What would the situation be if, as happened in the State of Maryland, one of the houses of the Texas legislature overwhelmingly passed a bill to prohibit the execution of the mentally retarded but, for reasons not related to the merits of the bill, the other house did not consider the bill? (See, *In the Assembly*, The Sun, Baltimore, Maryland, March 25, 1988 and *Legislature, Schaefer Close Mercurial '88 Session*, The Sun, Baltimore, Maryland, April 12, 1988, at 4A, Col. 3). Would it be alright to execute Penry when if both houses passed the bill it would not?

It is submitted that what is cruel and unusual punishment does not change. It is the yard stick that is used to measure what is cruel and unusual punishment that changes with the developing standards of civilized society. The question then is just how precise must this yard stick become before cruel and unusual punishment can be recognized? Should the Texas Legislature prohibit the execution of a mentally retarded offender this act alone would greatly increase the precision of the yard stick used by Texas. The question presented to this Court by Penry is whether or not the yard stick is at this time precise enough for the Court to find the execution of Penry would be cruel and unusual punishment.

At the competency hearing, Jerome B. Brown, Ph.D. summarized the contents of the various medical records

entered into evidence as Defendant's exhibits 3, 4, 6, 7 and 8.[5] The record from John Sealy Hospital, where in 1965 Penry's full scale IQ was 56 (VI R. 556, J.A. 34), were summarized as follows,

> I think several of the things are important. First of all, from a very early age, this man has been documented as being difficult to control. He has very great difficulty controlling himself, and behaving in the usual situations like other children. He has—I think the idea of being able to control and discipline himself is important. The short attention span, the impulsivity has been documented from an early age in this young man.
>
> * * *
>
> [E]ven in these early records, we are seeing indications that his ability to conform to the regular way of doing things to discipline himself, to follow instructions, to carry out some sort of plan is severely impaired. He simply cannot do what he's told to do for very long. The word impulsive means that he's prey to his own urges or impulses at the moment. He doesn't have the ability to say, "wait a minute, I'd better not do this. I better wait or better not do it at all." The short attention span is important. This means that he can't attend to things for any length of time. He can't focus. He can't concentrate.

VI R. 558 - 559, J.A. 35.

The record from Mexia State School, where in 1968, Penry's full scale IQ was 51 (VI R. 560, J.A. 36.), were summarized as follows:

> [T]here are a number of things I think that are important. First of all, in 1973, when this hospitalization took place, he was diagnosed as psychotic. This

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[5] These exhibits are in the trial record filed as an exhibit in the United States Court of Appeals for the Fifth Circuit.

means that something had happened to him, such that his ability to see reality or see the world around him as other people see it was severely impaired. He was hearing things and seeing things and developed a number of paranoid ideas about being attacked that were not based on any kind of reality, and he was—this was one of the main reasons for his hospitalization at that time. Again, the evaluation showed strong evidence of brain damage. His visual motor coordination was extremely poor. His motor control is quite poor. The evaluation by Dr. Bell indicates that he was impressed to the degree that he did not feel like he could function by himself at all in a social setting. That he would be subject to influence and manipulation by people more intelligent or sophisticated than he was. He is unemployable. He could only perform simple tasks. He felt that he would be exploited in something like a prison setting. He would be subject to attack by other inmates. He felt that he could not control himself when he was upset or under stress due to his lack of intelligence and his inadequate personality development. He is only able to understand simple words and phrases. His thinking is extremely concrete and on a superficial, simple level.

* * *

That means that he has only a very black and white kind of understanding of what's taking place. He has no ability to understand subtleties or nuances or to understand the implication of what's going on around him except in a very, very simple way. It's a long history of being exploited by others, abused. I think those are the main points.

VI R 562 - 563, J.A. 37-8.

The records from Rusk State Hospital, where in 1973 Penry's full scale IQ was 63 (VI R. 564, J.A. 38.), were summaried as follows;

> If you look at the nursing notes concerning his kind of day to day behavior on the ward, while he was there

at Rusk, you'll see that Johnny had a great deal of trouble taking care of himself there on the ward. He was prey to both his own impulses and also the other inmates. He was also fearful of them and felt that he would be hurt by them. There are several notes in there about that. It was obvious to me upon reading this it was difficult for the staff to tell when he was telling the truth and when he wasn't. That he was unreliable to them. For example, there is one note in here that says "it is to be noted that he might be telling the truth sometimes." So, the staff are confused about what he's saying. They seem to be perplexed as to what to do with him to help him. His behavior alternated between becoming difficult and obstreperous to being extremely complacent and approval seeking. He seemed to routinely do poorly, when he was released to go home for a visit. They couldn't even let him out long enough to go for a weekend furlough without him having some kind of difficulty like running away or becoming upset with his family in some kind of way. There are notes in here that he admits to doing things to the staff that he didn't really do in order so he wouldn't be picked on by them. They could coerce him into saying that he did things when he didn't do them. These are other inmates, in-patients would bully him.

VI R 565-566, J.A. 39.

The records from the Texas Rehabilitation Commission were summarized as follows:

> I think the most important aspects of this is the intellectual evaluation again, which revealed the verbal IQ of 56, which is again mild to moderate range of mental retardation. The comments I think are relevant from the psychologist in the report in this case, and this was last year, 1979, I believe. He lacks the ability to apply any basic academic skills to his daily life activity. He has exhibited inappropriate reasoning and judgment and daily life activities. He has not mastered basic social skills, which would allow suc-

> cessful participation in group activities. He is unable to function independent in the community and in gainful employment. He has exhibited an inability to conform to standards set by the community. His reading level is between the first and second grade. His spelling level is at the second grade. His arithmetic ability is in the early kindergarten grade. He is unable to read and write. He doesn't have any appropriate internal controls. He has poor vision. He cannot perform fine motor tasks. Very poor family background. His work history is essentially nil. He's been able to earn some money every now and then under the supervision of someone else. He—Well, again the history of exploitation of others, being victimized by others is revealed once again.

VI R. 566-567, J.A. 40.

Dr. Brown summarized his own observation as follows:

> [I]n addition to the administration of psychological tests, I also interviewed him at length, but the tests I administered because of the past records, we have a fairly accurate documentation of the past difficulties he has and, so I didn't go into a lot of extensive testing that would be repetitive. What I tried to do was once again document his intellectual level, which my results again produced an IQ of 54, which is consistent with the other results. The particular mental age that I obtained for this man was 6 1/2. Now that means that he has the ability to learn and the learning or the knowledge of the average 6 1/2 year old kid. I administered a estimate of social maturity. This is kind of how well you can take care of yourself and how well you can function in the world around you. On this particular test, he did a little better. He was able to score at the 9 or 10 year old level. In other words, he knows how to get around the world about as well as the average 9 or 10 year old. Again, I administered a test of visual motor coordination and memory, which reflects the organic brain damage or the brain disfunction that he has exhibited through his life. The results of the evaluation together with my interview

> indicate that he is a very simple and limited person. His understanding of the world around him is very concrete, and in terms of time, he is pretty much oriented from one moment to the next. His understanding of history, for example, is only in terms of before and after. He is very limited in his ability to understand what is taking place, and has only a very simple and very general kind of understanding abut what is taking place, for example, here today in the Courtroom.

VI R. 568-569, J.A. 40-1.

At the guilt or innocence portion of Penry's trial, Dr. Jose G. Garcia testified that on the basis of the reports he had reviewed from Penry's past medical records (these reports were introduced into evidence as Defendant's exhibits 3, 4, 6, 7 and 8 XVI R. 2125, J.A. 84) and his own examination of Penry that,

> I'm referring to a brain disorder that affects an individuals' ability to use thinking, judgment and volition. That is, the free will is impaired to such a degree that such a person has difficulty exercising intelligent, reasonable judgment. In addition, a person who has this type of brain disease, brain defect, doesn't know how to learn from experience, and they, in fact, have no impulse control or extremely poor impulse control.

XVI R. 2129-30, J.A. 87.

> [P]art of that has to do from the result of my examination of Mr. Penry and part of it has to do with the examinations that have been conducted by physicians, psychiatrists, psychologists, counselors, way back since 1965. That have again, and again, and again, come back with almost identical reports even though they did not, the way I understand it, have access to the previous reports, when they examined him, until after the in-take examination was completed. So that the scores, the examinations, have

almost been carbon copies, so that in itself tells us that there has been almost no change or no change whatsoever since 1965. And in my examination, I found strong clinical evidence that he continues to have the same symptoms that are compatible with an organic brain disorder.

* * *

[T]he type of language he uses is the type of language that is found in an individual who may have less than a first grade education level. The language is rather primitive, although the language may seem understandable to everyone else. Secondly, he doesn't even know how to spell words as simple as dog and cat. When he was asked to spell the word "cat" he spelled c-a-r. And he printed. He spelled the word "dog" as saying d-i-d-y. I asked him how many days were in a week, and he said he did not know the days of the week, but when I asked him what day it was that the examination was being conducted, he said he had been told it was a Monday. The questions had to do with trying the present questions in a manner that were understood by him. So, I asked when is pay day, because I understand that he was attempting to work and he remembered it was Saturday. And he remembered that Sunday is the day to go to church, but the other days he did not recall or knew what they were. He told me that there were four nickels in a quarter and that he attempted to sound very intelligent. When I asked him how many months were in a year, he said "most people said there were six, but I think there are more than that." How many? "There are eight." And he appeared quite sincere in giving that information. Then I asked him to give me the names of the months. He proceeded to mention February, August, July, September, November, June, and then repeated September. When I asked him why he repeated September, he had forgotten that he had already mentioned September.

XVI R. 2131-34, J.A. 88-9.

Just as a juvenile that was 15 years old at the time he did the crime is less culpable than an adult so to is a mentally retarded person. A mentally retarded person may have had more experience than a juvenile but because of the deficit in adaptive behavior that is one of the characteristics of retardation, Penry is unable to learn from this experience. Because of his retardation, he does not have the perspective and judgement expected of a person of normal intelligence. Penry has a history of being susceptible to influence, he is more impulsive and less self-disciplined than that of a person of normal intelligence. He has little to no capacity to control his conduct and to think in long-range terms. In addition, the record in Penry's trial documents the failure of Penry's family, the Texas Mental Health - Mental Retardation System and the Texas Prison System to properly treat a mentally retarded person with the reasoning capacity of a 6 to 7 year old.

Although the legislatures of the various states are only now starting to consider the issue of execution of a mentally retarded person, public opinion surveys indicate there is an even stronger sentiment against execution of a mentally retarded person than there is against executing a person under the age of 18 at the time of the offense. ROA between 63 and 64, J.A. 279. In addition, execution of a mentally retarded person is strongly opposed by the professionals in the field of mental retardation. The American Bar Association Standards are against imposition of the maximum punishment when the offender is mentally retarded. This Court has decided that a juvenile who was 15 years old should not be executed because one of that age does not have the maturity, judgment, and perspective of an adult and they are more vulnerable, impulsive, have less capacity to control their conduct and think in long-range terms. A mentally retarded person has these same problems. For these same reasons, a mentally

retarded person with the reasoning capacity of a seven year old should not be executed. To execute Penry would be cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

CONCLUSION

For the above reasons, this cause should be remanded with instructions that Penry's sentence of death be vacated, as cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

Respectfully submitted,

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